

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Reexamination of the Comparative Standards)	MM Docket No. 95-31
For Noncommercial Educational Applicants)	
)	
Association of America's Public Television)	
Stations' Motion for Stay of Low Power)	
Television Auction (No. 81))	
To: The Commission		

COMMENTS OF STATION RESOURCE GROUP

The Station Resource Group ("SRG") respectfully submits these comments in response to the above-captioned Second Further Notice of Proposed Rule Making ("SFNPRM"), MM Docket No. 95-31 (released February 25, 2002).

SRG is a membership organization of the nation's leading noncommercial educational ("NCE") broadcasters. SRG's 46 members operate 164 public radio stations across the country, account for one-third of public radio's audience, and produce the majority of public radio's national programming. SRG works for funding, regulatory, and legislative policies that advance public radio's services nationwide. SRG limits its comments to issues affecting radio frequencies.

INTRODUCTION

The SFNPRM seeks a solution to an intractable problem: how to resolve situations in which mutually exclusive applications are filed by competing applicants. As the SFNPRM notes, this problem dates back more than a decade, *See Reexamination of the Policy Statement on Comparative Broadcast Hearings*, GC Docket No. 92-52, 7 FCC Rcd 2664 (1992), and

implicates even more longstanding attempts to devise satisfactory methods of awarding construction permits for new commercial and noncommercial stations. The Commission has, at least temporarily, resolved this problem by establishing a point system to distinguish between mutually exclusive applications for noncommercial stations and by establishing a competitive bidding or “auction” system for non-reserved frequencies for commercial stations.

The unresolved issue is how to award construction permits when competing applicants wish to use a non-reserved frequency for a commercial and noncommercial station. The Commission’s initial answer to this problem was to require all applicants to participate in an auction. The U.S. Court of Appeals for the D.C. Circuit rejected this approach, as inconsistent with the plain language of Section 309(j)(2) of the Communications Act. *NPR v. FCC*, 254 F. 3d 226 (D.C. Cir. 2001).

The SFNPRM seeks comments on different approaches, and specifically on the following three options:

1. To hold NCE entities ineligible for licenses for non-reserved channels and frequencies.
2. To permit NCE entities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities.
3. To provide NCE entities additional opportunities to reserve channels in the Table of Allotments.

THE STATUTORY FRAMEWORK

As in any question of statutory interpretation, definitions are essential. The options posed by the SFNPRM can be addressed only by distinguishing carefully among the following terms: non-profit entity; non-reserved frequency; and noncommercial educational (“NCE”) station

Section 397(6) of the Communications Act identifies three categories of eligible applicants for a noncommercial educational broadcast station: (1) a public agency, (2) a non-profit private foundation, corporation, or association; or (3) a municipality which transmits only noncommercial programs for educational purposes.

Section 397(8) of the Act defines a “non-profit” as “a foundation, corporation, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.” Collectively, the eligible classes of applicants are generically identified in these Comments as “non-profits.”

Section 309(j)(1) provides that if mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in the exemptions set forth in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding.

Section 309(j)(2) defines exemptions to this statutory mandate and provides that the competitive bidding authority granted by the subsection shall not apply to licenses or construction permits issued by the Commission “(C) for stations described in Section 397(6) of this Act.”

Section 397(6) defines a “noncommercial educational broadcast station” and a “public broadcast station” as a radio or television broadcast station which “is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated” by a non-profit. Section 73.503 of the Commission’s Rules provides that a noncommercial educational FM broadcast station will be licensed only to a non-profit educational organization and upon a showing that the station will be used for the advancement of an educational program.

Sections 73.201, 73.202 and 73.501 of the Commission's Rules reserve radio frequency spectrum between 88 MHz and 91.9 MHz (Channels 201-220) exclusively for use by noncommercial educational broadcast stations. Under current policy, additional, non-reserved FM channels may be reserved exclusively for use by a noncommercial station upon a showing that:

- (A) the NCE radio proponent is technically precluded from using the reserved band by existing stations or previously filed applications . . . and
- (B) the NCE proponent would provide a first or second radio . . . NCE service to 10% of the population within the proposed allocation's 60 dBu (1 mV/m) service contour. . . . New service to fewer than 2,000 people would be considered insignificant for purposes of this determination.

Reexamination of the Comparative Standards for Noncommercial Educational Applicants,
15 FCC Rcd 7386, 7434 (2000).

The Commission's first attempt to reconcile these various statutory and regulatory provisions was to require any non-profits that wished to construct a noncommercial station on a non-reserved frequency to participate in an auction for that frequency. The D.C. Circuit found that approach inconsistent with statutory language which exempts licenses or construction permits for noncommercial educational "stations" from competitive bidding. *NPR v. FCC, supra*.

DISCUSSION

The critical question presented is what a noncommercial educational ("NCE") station is, and more precisely, when an application becomes an application for an NCE station. The possibilities are: (1) when a non-profit files an application for any frequency, whether the frequency is reserved or non-reserved; (2) when a non-profit expresses an interest in a non-reserved frequency designated for auction; or (3) when a non-profit specifies its desire to operate

an NCE station and demonstrates that it is eligible to hold a construction permit or license for an NCE station. SRG believes that the third approach is the correct one.

THE COMMISSION’S FIRST OPTION IS NO OPTION

The first approach the Commission has proposed, to hold NCE entities ineligible for licenses for non-reserved channels and frequencies, is inconsistent with historical fact, with desirable policy, and with Section 309(j)(2) of the Communications Act. As the SFNPRM acknowledges, this approach would be a departure from existing policy. SFNPRM, ¶ 11. Non-profits have historically operated on a noncommercial basis on non-reserved channels. In an earlier phase of this proceeding, National Public Radio (“NPR”) and Association of America’s Public Television Stations (“AAPT”) reported that 37 of their members operated on non-reserved FM channels, 20 on non-reserved AM channels, and 15 on non-reserved TV channels. 15 FCC Rcd at 7429. These numbers underestimate the number of non-profits who actually operate on non-reserved frequencies, since not all NCE stations are NPR or PBS affiliates. In addition, an undetermined number of non-profit entities not only operate on non-reserved channels, but do so on a for-profit basis. Section 1.1124 of the Commission’s Rules indirectly recognizes this fact by providing fee exemptions only for “applicants, permittees or licensees of noncommercial educational broadcast stations.” Non-profits who operate a station in a for-profit basis are not fee exempt.

As a matter of policy, non-profits should not be excluded from auctions based purely upon their non-profit status. Non-profits may wish to bid on non-reserved frequencies at auction, particularly if the only alternative is to be denied any opportunity to obtain the use of the frequency at issue. As a general matter, Commission policy should favor including non-profits who voluntarily wish to participate in auctions, since their presence will stimulate competition

for the frequency or advance other public interest goals, and therefore tend to advance the public interest.

Finally, it would be a perverse interpretation of congressional intent to transform a statutory exemption for noncommercial stations into a disqualification of all non-profit applicants.

THE COMMISSION'S OPTION 2 LEADS TO IMPASSE

The Commission's second option, to permit NCE entities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities, parallels the second possibility SRG enunciated, that an entity becomes an applicant for a noncommercial station when it expresses an interest in the frequency designated for auction by timely filing FCC Form 175. This approach leads to the present impasse. If every expression of interest in a non-reserved frequency by a non-profit is sufficient to prevent the frequency from being auctioned, few, if any, non-reserved frequencies will be auctioned. In fact, nothing would prevent a single non-profit from expressing an interest in every non-reserved frequency designated for auction, and thus defeating the statutory mandate that the Commission implement a competitive bidding system.

As the Commission noted in discussing a similar exemption for public safety entities who wish to use private mobile frequencies set for auction:

[A] license assignment scheme that would permit any entity seeking to use spectrum for public safety purposes to prevail against all other mutually exclusive applicants in securing spectrum designated for auction would, in effect, give [such entities] a 'right of refusal' over any spectrum made available by the Commission under its competitive bidding processes.

Memorandum Opinion and Order, Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, WT Docket No. 99-87 (April 18, 2002).

FCC Form 175 encourages the view that the filing of this form is the point at which an auction exemption is claimed by including a question (Item 9), which asks the applicant to indicate whether its status is “noncommercial educational.” Item 9 does not, however, correlate with any other question in Form 175. The question with respect to the noncommercial status of the applicant is the only “status” question on the form that has a substantive impact on the auction. All other indications of status are “collected for statistical purposes only.” See Instructions to FCC Form 175, Item 9. Thus, an applicant who might, in fact, be ineligible to operate a noncommercial station could, simply by answering this question in the affirmative, bring the auction for the frequency to a halt. The question concerning the “noncommercial” status of the applicant should either be removed from the form or be used only for statistical purposes.

SRG’S VERSION OF OPTION 3 HOLDS THE GREATEST PROMISE

The third option holds the greatest potential for resolving the issues posed by this proceeding. The key to this option is the determination that an application becomes an application for an NCE station only when a non-profit specifies its desire to operate an NCE station and demonstrates that it is eligible to hold a construction permit or license for an NCE station. A non-profit becomes an applicant for an NCE station only when it files an application for a construction permit (FCC Form 340) or license (FCC Form 302) for an NCE station and demonstrates its eligibility to own and operate the station on a noncommercial basis. This would occur in one of two circumstances: one, when the frequency is reserved for noncommercial

usage and a filing window for applications is opened; or two, when the prevailing applicant in an auction proceeding files a long-form application that seeks to designate the station as an NCE station.

To make these circumstances meaningful, the FCC must provide non-profits a realistic opportunity to reserve non-reserved frequencies for noncommercial stations. Absent such an opportunity, non-profits will in many situations, be unable to obtain an “NCE station” *except* by participating in an auction. That result is clearly antithetical to the holding of *NPR v. FCC*.

To provide an opportunity to propose the reservation of the channel for NCE stations, while minimizing the impact of such an opportunity on auction procedures, SRG recommends opening a 30 day window (“Petition Period”) during which non-profits may propose dedication of allotted frequencies for noncommercial purposes. Replies or oppositions would be filed in a 15-day reply period. Those frequencies for which no petition is filed will proceed to auction.

During the Petition Period, non-profits should be allowed to propose that a non-reserved frequency be reserved for noncommercial stations, based upon the relative need for a new NCE station as opposed to the need for a new commercial station. SRG favors an objective standard that is simple to administer and affordable for non-profit organizations. SRG will reserve until Reply Comments its thoughts on the specific standard proposed by the FCC and other commenters.

SRG also proposes that during this Petition Period, non-profits should be allowed to explain why reservation of the channel for noncommercial stations would serve the public interest, even if the channel does not meet the technical criteria for reservation. Although the Commission would not be required to reserve a frequency based upon non-technical considerations, applicants who later filed expressions of interest in the frequency by submitting

Form 175 would be allowed to settle the proceeding by dismissing their applications, on condition that the frequency be reserved for noncommercial purposes. Only non-profits that had petitioned for reservation of the channel (on technical or non-technical grounds) during the Petition Period would be eligible to apply for the frequency, or an NCE station.

The auction anti-collusion rules, Sections 1.2105(c)(1) and 73.5002(d), would have to be modified to permit the for-profit applicants to discuss the dismissal of their applications, for no consideration, and the reservation of the channel exclusively for noncommercial purposes. A date for filing such settlement agreements would be established in the Public Notice that identifies the applications accepted for filing. If no global settlement agreement was filed by the deadline specified, the frequency would be set for auction. Non-profits who had expressed an interest in the frequency by filing a Form 175, would be eligible to bid.

The Commission would review the settlement agreement to determine that grant of the agreement and reservation of the frequency would, in fact, serve the public interest. A filing window would then be opened during which eligible non-profits could file applications for a noncommercial station on the frequency. If more than one application was filed, the mutual exclusivity would be resolved by the point system.

After non-profits are given an opportunity to reserve vacant but allotted FM frequencies, they can be expected to exercise their opportunities to reserve the channel through the usual rulemaking process.

CONCLUSION

In summary, SRG strongly opposes making non-profit entities ineligible for licenses on non-reserved channels. It, instead, recommends giving non-profits an opportunity to request reservation of non-reserved channels on both technical and non-technical grounds. An applicant

proposing reservation on technical grounds would be required to meet the criteria adopted in this proceeding. An applicant proposing reservation on non-technical grounds would be eligible to apply for a noncommercial station on the frequency if all for-profit applicants that filed an expression of interest agreed to dismiss their applications for no consideration. The frequency would then be reserved for a NCE station. Any non-profits who had proposed reservation of the channel on either technical or non-technical grounds would be eligible to apply for a noncommercial station on that channel. Frequencies not reserved for noncommercial stations on technical or non-technical grounds would be auctioned, without regard to the for-profit or non-profit status of the applicants.

Respectfully submitted,

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